UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 9

EAGLE CREEK MINING, LLC 1/

Employer

and

Case 9-RC-18325

UNITED MINE WORKERS OF AMERICA, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The Employer operates two surface coal mines near Sharples, West Virginia, commonly referred to by the parties as the Eagle Creek No. 3 and Eagle Creek No. 5 mines (hereinafter the No. 3 mine and No. 5 mine). The Petitioner filed a petition under Section 9(c) of the National Labor Relations Act seeking to represent a unit comprised of all production and maintenance employees ²/ employed by the Employer at the No. 3 mine at Sharples, West Virginia, excluding all office/clerical, security guards and supervisory personnel. The Employer, contrary to the Petitioner, contends that the only appropriate unit must include all surface miners at both the No. 3 and No. 5 mines. The parties also disagree concerning the unit placement of April Lester, clerk; Nora "Sue" Ferrell, parts runner; and, Lenzie Blanton, Marshall LeMaster, and Joe Fairchild, mechanics, whom the Petitioner, contrary to the Employer would exclude from the unit. There is no history of collective bargaining affecting any of the employees involved in this proceeding.

As more fully explained below, I find that a bargaining unit comprised solely of the Employer's No. 3 production and maintenance employees constitutes an appropriate unit for purposes of collective bargaining. In addition, I find that the clerk, parts runner, and mechanics should be excluded from the unit found appropriate. In reaching my determination, I have considered the record evidence as a whole as well as the arguments made by the parties at hearing and in their post-hearing briefs. ³/ In explaining how I came to my determination on

¹/The name of the Employer appears as amended at the hearing.

² / In its post-hearing brief, the Petitioner clarified that it seeks to represent all of the surface coal miners at this location.

³/Subsequent to the receipt of the parties' timely post-hearing briefs, the Employer submitted a letter ostensibly to correct a misstatement of stipulated facts in the Petitioner's brief. Thereafter, the Petitioner responded to the Employer's letter in an effort to clarify its position. The record is clear and the letters are unnecessary to my determination of the unit issue.

these issues, I will first describe the Employer's operations and then analyze the unit issue in relation to applicable Board precedent.

II. THE EMPLOYER'S OPERATIONS

A. The Employer's Hierarchy:

Thomas A. Potter and John Mitchell Potter are owners of JMP Coal Holdings, which owns several mines ⁴/ located in West Virginia and Kentucky. Eagle Creek Mining, LLC is a wholly owned subsidiary of JMP Coal Holdings, Inc. Thomas A. Potter is in charge of mine planning and Jeffrey Sands, Vice President of Operations, reports directly to the Potters and has overall operational responsibility for all of the mines.

The record discloses that the foremen of the No. 3 and No. 5 mines exercise a significant degree of daily responsibility. There is one foreman assigned per shift for each mine. The No. 3 mine's day shift foreman is Gary Ludwig and Jerry Francis serves as the night shift foreman. William Curry is the day shift foreman for the No. 5 mine and James Hynd is the nightshift foreman. Typically, the foremen work at their assigned mine and do not move between mines. When there are job vacancies at the mines, the foremen interview applicants and test the applicant's performance on various jobs. The foremen report on the applicant's performance to Sands, who makes the final hiring decision. The foremen also write-up employees for disciplinary actions ranging from verbal warnings up to discharge, with Sands signing and making the final decision. At both mines, the foremen have authority to suspend employees pending investigation. The foremen are empowered to send employees from one mine to the other as needed. Sands decides what wages and fringe benefits to pay employees after discussion with the Potters. Sands also determines the number of miners to employ, whether to hire temporary employees, and the work hours for the mines after consulting with the foremen. The two mines have separate MSHA identification numbers and are considered separate cost centers.

B. The Employer's Physical Layout and Operations:

Eagle Creek No. 3 and No. 5 are both surface mines. The Employer mines coal and performs environmental reclamation work at these mines pursuant to a contract with Arch Coal, an unrelated company, which owns the coal in question. The Employer's contract with Arch Coal requires it to produce 72,000 tons of coal per month at a quality of 12-2 BTUs with ash content below 11 percent. The Employer utilizes coal from both the No. 3 and No. 5 mines to satisfy its obligations under the contract. The coal from No. 3 is of a higher quality and that mine supplies approximately 42,000 tons of coal while the remainder, or roughly 30,000 tons, is produced by the No. 5 mine. The Employer could not fulfill the terms of the contract using coal only from one mine or the other because coal from both mines must be mixed to reach an acceptable level of quality.

⁴/The mines are Eagle Creek No. 3 and Eagle Creek No. 5, both located south of Sharples, West Virginia; Eagle Creek No. 4, in Mingo County, West Virginia; Eagle Creek No. 7 in Kentucky; and Hawkeye which has various locations that are unspecified in the record.

The parking lots for the No. 3 and No. 5 mines are located about 5.3 miles apart from each other by travel by road. At any given time, the worksites for the miners may be physically closer than this, but there is no basis on the record to conclude that the miners could travel to one another's work locations by any means other than the road. Once employees park in their respective lots, school buses are used to transport them to the job sites. Only certain isolated portions of the land for which mining permits are held are actually being mined at any given time. A work site may be located a distance of 1 to 2.5 miles away from the parking lot for that mine. Accordingly, actual travel from the working area of the No. 3 or No. 5 mine to the other mine's worksite would require a longer journey than simply travelling between the parking lots. Although both mines share a common training building, office/communication building and bathhouse, these buildings are located much closer to the No. 5 mine than to the No. 3 mine. Indeed, two employee witnesses from the No. 3 mine testified at the hearing that they did not use the bathhouse, which is about 4.5 miles away from the No. 3 mine employees' parking lot. An unmanned trailer containing a telephone, facsimile machine and various permits required by state and federal regulatory agencies is located close to the No. 3 mine.

The Employer uses road graders, water trucks and excavators in support of its mining operations. A road grader is a mobile piece of equipment with a blade to keep the haul roads smooth and graded while water trucks are used to control dust on the haul roads. Excavators are track-mounted pieces of equipment used to build ditches and berms and to clean high walls. The Employer also has service trucks, which are used to haul oil and grease for the equipment. Mechanics use trucks to get to the jobsite in order to perform maintenance on the equipment.

The process for mining coal and the operating equipment used is the same at both mines. The Employer engages in surface mining, called "contour mining," where a cut is taken around a hill and the overburden is removed. The first step in this process is to remove the trees at the site. Dozers then level off the location to be mined and drills are used to prepare the area for blasting to open up the overburden. Large bulldozers then push the overburden out to be loaded. Multiple pieces of equipment are used to form a "loader spread", which is used to mine and remove the coal. End loaders scoop rocks and overburden into rock trucks, which range in size from 100 to 150 tons and are used to haul the overburden. Smaller coal loaders are used to chop up and prepare to load the coal. The coal is then loaded into trucks, for transport to Arch Coal's preparation plant. After the bottom of a seam is reached, the land is reclaimed, returned to the approximate original contour and hydroseeded. The Employer uses various subcontractors to complete many of the tasks described, including preparing the necessary certification work, providing security services and steam cleaning. The same subcontractors are used at both the No. 3 and No. 5 mines.

Both mines employ hauler operators, loader operators, water truck operators, drill operators, excavator operators, fueler/greaser operators, and dozer operators. The jobs are described in the Employer's handbook, which is in effect at both mines. There is no difference in the training or skills required at the No. 3 and No. 5 mines. As of the date of the hearing, 29 employees were employed at mine No. 3 and 27 were employed at mine No. 5. The three mechanics at issue are assigned to work at both mines, as well as the Employer's other operations. Employees of both mines attend together an 8-hour annual safety training program. Consistent with this practice,

Miner Kevin Hill, who is assigned to Mine No. 3, indicated on his 2008 annual MSHA training certificate that Eagle Creek No. 3 and No. 5 was the name and location of training.

C. Employee Interchange

Equipment and personnel may be temporarily moved from No. 3 to No. 5 and vice versa as needed, but it is unclear from the record how often this actually happens. Some pieces of equipment are easier to transfer than others. For example, each mine has one water truck and one grader assigned to it. If either of these vehicles breaks down, its equivalent from the other mine can be transferred relatively easily because this machinery can legally use paved roads to go from one job site to the other. It takes about 10 minutes for a water truck to drive from one mine to the other and about 15 minutes for a grader. Loaders, rock trucks and excavators are also occasionally moved from mine to mine. Excavators are only transferred if there is a major problem with an excavator at the other mine. It might take up to a half day to "legally" transport larger equipment, such as a loader, on paved roads from one mine to the other and 30 to 40 minutes to move a bulldozer or excavator from one mine to the other.

If an equipment operator were to move from one mine to the other, that person would be supervised by the foreman at that location. From 2008 to October 18, 2010, 14 hourly employees and 1 foreman transferred from No. 3 to No. 5, or vice versa, at least once for periods longer than 1 day (which the Employer refers to as a "permanent transfer"). However, the record does not disclose the actual length of a particular transfer. In April 2009, there was a layoff on the second shift at the No. 3 mine, but the record does not reflect how many employees were laid off. It appears that approximately three of the laid-off employees went to the No. 5 mine and were permitted to keep their respective seniority dates. The record does not reflect the process by which these employees were transferred or whether they were formally rehired. Although shorter transfers occur, the Employer does not record them and there was no precise testimony in the record about how frequently short transfers occur.

The testimony of two employees from the No. 3 mine indicates that transfers between the No. 3 and No. 5 mines are limited. For example, Kevin Hill, a 3-year dayshift employee, testified that there has only been one occasion when he worked at the No. 5 mine; specifically he took a loader to the No. 5 mine and worked there for about 4 hours. Hill also testified that he was aware of limited instances in which employees assigned to one mine worked at the other. In this regard, one employee was terminated from one mine but hired at the other and, on one occasion, another employee who is regularly assigned to No. 5, worked as a "fill in" boss at No. 3 while the regular foreman was on vacation. Further, Eddie Walls, a 6-month night shift employee, testified that he once operated a grader at the No. 3 mine that was transferred from the No. 5 jobsite. Walls was not aware of any temporary transfers from No. 3 to No. 5 or vice versa.

Employees have radios in their vehicles to communicate with one another, but the No. 3 and No. 5 mines have separate radio channels. Depending on the geographic location, an employee working on a No. 3 jobsite may be able to hear the communications on the No. 5 mine channel and vice versa, but employees at one mine are discouraged from using the radio to communicate with employees from the other mine. This rule is necessary to keep the lines of communication less cluttered in case the channels are needed for important matters. Employees are prohibited

from using cell phones on company time and are required to keep their cell phones in their personal vehicles.

D. Employee Benefits and Terms of Employment

All employees, regardless of whether they are assigned to No. 3 or No. 5 mines, attend the same "new employee" orientation and must fulfill the same requirements to be hired, i.e. they must possess the requisite certifications and satisfy their respective foreman and Sands that they are capable of performing the work for which they were hired. All new employees serve a 90day probation period. All employees, including those at the Employer's other mines (Eagle Creek No. 4, Eagle Creek No. 7, and Hawkeye facilities) are governed by the same rules and policies, subject to the same handbook and enjoy the same benefits, including a 401(k) plan, health insurance and life insurance. All employees are subject to the same disciplinary process (verbal warning, followed by written warning and then termination). The record does not disclose any range of employee wage rates, but apparently wages depend on the employee's specific job assignment and level of experience and are not affected by jobsite assignment. Employees at both the No. 3 and No. 5 mines recently received the same across the board wage increase. Any employee certified as an EMT, despite job assignment or job location, receives the same bonus. Paychecks for both the No. 3 and the No. 5 mines are mailed on the same day. Both mines use the same seniority system for purposes of calculating vacation and bonuses. The record discloses that if an employee transfers between the No. 3 mine to the No. 5 mine, the employee retains his seniority date. Permanent personnel files for all employees are maintained at the Employer's corporate office in Pikeville, Kentucky. The Employer occasionally provides parties and picnics for its employees and employees of both the No. 3 and No. 5 mines are invited to attend. Depending on the location of the event, employees of the other mines may also attend.

E. The Clerk, Parts Runner and Mechanics

April Lester works from 6 a.m. to 3:30 or 4 p.m as a mine clerk/parts runner/EMTand her supervisor is No. 5 Dayshift Foreman William Curry. She starts her day by going to an unmanned trailer close to the No. 3 mine and picking up paperwork and then reports to the office and communication building near No. 5 mine, where she spends 75 to 80 percent of her day. In addition to Lester, Curry, another foreman from the Employer's Hawkeye mine, and Engineer Ray Bennett also work in the office at least part of the day. Lester's duties include faxing daily production reports and forwarding purchase requests from the foremen to the Employer's corporate office in Pikeville, Kentucky; keying in payroll information and time sheets; and, maintaining employee personnel files. She also forwards citations from state and federal officials to Sands and Safety Director John Opperman and reports accidents to Opperman. Lester arranges medical examinations and conducts orientation and hazard training for new employees. She has a CB radio and a land line; her CB radio picks up the No. 5 mine's channel, but not that of the No. 3 mine. If the foremen can't reach employees on the radio, they will give messages to Lester to pass on to them and she also relays messages to employees from their families as needed.

In addition to her clerk duties, Lester sometimes substitutes for Norma "Sue" Ferrell, the parts runner, if she is absent, and performs EMT duties as needed. As an EMT, Lester provides emergency medical assistance for both mines, although she is specifically assigned to No. 5 for this function. There only have been two instances since Lester was hired in April 2008 when she performed EMT duties at the No. 3 mine. When she goes to the mine area, Lester wears steel-toed boots and eye protection if working around the equipment. Like the other miners, Lester attends the Employer's annual training program.

Parts Runner Norma Ferrell delivers parts needed to repair or service equipment to both the No. 3 and No. 5 mines. She also prepares paperwork associated with parts orders and turns in paperwork at the Employer's office, located north of the No. 5 mine. Ferrell is dispatched from the Employer's Pikeville, Kentucky facility, which is where the parts are ordered. The Pikeville office instructs Ferrell where to pick up the parts from various vendors. She then delivers the parts to the mechanics or the foremen. Ferrell attends the annual required MSHA training with the No. 3 and No. 5 surface miners.

Joe Fairchild, Lenzie Blanton and Marshall LeMaster work for the Employer as mechanics. They drive trucks that bear the insignia of Eagle Creek, Hawkeye and Falcon Ridge (an equipment company owned by the Employer's owners). It appears that the mechanics work at all of the Potters' operations as needed – not just the No. 3 and No. 5 mines. Joe Fairchild, the Employer's tire mechanic, is responsible for maintaining and changing tires on the Employer's equipment. Fairchild is summoned by the foremen as needed. Lenzie Blanton changes motors and works on the undercarriages of equipment. Like the others, he works wherever he is needed, and sometimes works out of the Employer's shop in Robson Creek, Kentucky near the corporate office. Marshall LeMaster functions as a troubleshooter and diagnoses major mechanical problems. Like the other mechanics, his area of responsibility is not limited to performing duties at the No. 3 or No. 5 mines and his assignments take him wherever he is needed.

III. LEGAL ANALYSIS

The Act does not require that the unit for bargaining be the only appropriate unit, or the ultimate unit, or even the most appropriate unit; the Act requires only that the unit sought be appropriate. Transerv Systems, 311 NLRB 766 (1993); Morand Brothers Beverage Co., 91 NLRB 409, 418 (1950). Moreover, a union is not required to seek representation in the most comprehensive grouping of employees unless such grouping alone constitutes an appropriate unit. Bamberger's Paramus, 151 NLRB 748 (1965). Although not dispositive, a petitioner's unit desire is a relevant consideration. Marks Oxygen Co., 147 NLRB 228, 230 (1964). Moreover, it is well settled that there is often more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining. Overnite Transportation Co., 322 NLRB 723 (1996). Despite this, the Board will not find a grouping of employees that is arbitrary or artificial to be appropriate. Moore Business Forms, Inc., 204 NLRB 552 (1973); Glosser Bros., Inc., 93 NLRB 1343 (1951). Thus, I must first examine the unit sought by the Petitioner and determine if it is appropriate. If it is not, I must examine the alternative unit suggested by the Employer, but I retain authority to select a unit that is different from the unit sought by the Petitioner or the alternative unit which the Employer maintains is appropriate. Boeing Co., 337 NLRB 152, 153 (2001).

A single location unit is presumed to be appropriate unless it is so effectively merged into a more comprehensive unit, or so functionally integrated, that it has lost its separate identity. *Hegins Corp.*, 255 NLRB 1236 (1981); *Penn Color, Inc.*, 249 NLRB 1117, 1119 (1980). The Board will not grant a labor organization its desired unit in situations where it does not possess a separate community of interest from the Employer's other employees. *Brand Precision Services*, 313 NLRB 657 (1994). In analyzing this issue, I am cognizant of Board precedent which states that "the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *International Paper Co.*, 96 NLRB 295, 298 fn. 7 (1951). In determining whether the employees of separate facilities, such as those at issue here, have a distinct community of interest, the Board looks at factors such as the degree of functional integration, frequency of contact with other employees, interchange among the employees, the nature of the employee skills and functions, commonality of wages, hours, benefits and other working conditions, and shared supervision. *Publix Super Markets, Inc.*, 343 NLRB 1023 (2004).

A. Functional Integration:

The record does reflect some degree of functional integration among the employees at issue. All of the employees at the No. 3 and No. 5 mines are involved in the process of mining and loading coal pursuant to the terms of the Employer's contract with Arch Coal. Further, the coal from both mines must be mixed to satisfy the terms of the contract. Nevertheless, the two mines appear to largely function independently of one another. The work sites are physically located several miles from one another and access is by road. Each mine has its own equipment and employees. It appears that the primary reason for transferring equipment from one mine to the other occurs when there is a malfunction in machinery. The employees of No. 3 mine do not regularly rely upon or coordinate with the employees of No. 5 mine to perform their daily duties and vice versa. Each employee complement mines coal from their respective areas and then loads it onto the trucks of a contractor for transportation to Arch Coal. This important fact distinguishes the instant situation from cases relied on by the Employer such as *Pickering & Co.*, Inc., 248 NLRB 772 (1980) where employees worked at two different facilities, but all played different roles in manufacturing the same audio components. The case at hand is also factually distinct from NLRB v. Harry T. Campbell Sons' Corp., 407 F.2d 969 (4th Cir. 1969) where employees located within two departments of a stone quarry regularly handled the same product and interacted with one another. Although not dispositive, the essential separateness of the two mines is underscored by the fact that the mines are treated separately for accounting purposes and have separate MSHA identification numbers. Thus, I find that there is a relatively low degree of functional integration between the employees of the No. 3 and No. 5 mines.

B. Frequency of Contact:

The relatively low level of functional integration between the No. 3 and No. 5 mines results in minimal work-related contact among the respective employees of the two mines. Employees park at different parking lots before being transported to their assigned mines by separate buses. Once they are at work, the No. 3 and No. 5 employees are discouraged from communicating with one another by CB radio and they are prohibited from having cell phones on the job. Although

the coal from both mines is ultimately transferred to a common processing facility owned by Arch Coal, this is accomplished by a subcontractor trucking service. Thus employees do not even have contact with one another at the coal loading stage. It appears that employees are occasionally assigned to work at one mine or the other, but the record does not reflect with any precision how often this happens. Testimony provided by both a No. 3 dayshift and a night shift employee strongly suggests that these temporary assignments are rare. Both groups of miners attend annual retraining together, but this only happens once per year for a few hours. The bathhouse north of No. 5 apparently is available to the No. 3 miners, but it appears that they rarely, if ever, use it.

C. Interchange:

Although the Employer presented evidence that 14 employees transferred between the No. 3 to the No. 5 mine, for a period longer than a day, I find this to be a limited number over a 2.5 year time period. It is telling that if an employee transfers between mines for more than a day, the occurrence is memorialized in the Employer's records, which suggests that these examples of interchange are infrequent. As mentioned above, it appears that there is some temporary movement of employees between mines but the frequency of the transfers is not disclosed by the record.

D. The Nature of the Employee Skills and Functions:

The miners from both the No. 3 and No. 5 mines possess the same skills and use the same kinds of equipment to mine and transport coal and to keep the roads clear for this process to occur. The fact that all of the employees undergo the same new employee orientation program and have the same handbook, which contains the job descriptions, underscores the similarities between their jobs.

E. Commonality of Wages, Hours, Benefits and Other Working Conditions:

All of the Employer's employees receive the same benefits and are subject to the same work rules and policies. The pay of the No. 3 surface miners appears to be equivalent to that of No. 5 mine employees who have the same skills and levels of experience.

F. Shared Supervision:

Regarding the existence of common supervision among the Employer's employees, the record reflects that all employees are ultimately under the authority of Vice President Sands. However, it appears that an employee's shift foreman plays a much more important supervisory role on a daily basis. Thus, this situation is distinguishable from the facts presented in *Waste Management of Northwest*, 331 NLRB 309 (2000), relied on by the Employer, where the employees of one of the locations at issue did not have any statutory supervisors assigned to it on a full-time basis. Here, it is the foremen who evaluate job applicants' abilities and assess whether they are capable of performing their assigned duties at the mine. While Sands makes the ultimate hiring decision, the foremen supervise and assess employees during the probationary period. Although Sands must endorse any discipline, the foreman is the one who decides

whether discipline is warranted. Further, it is the foremen who decide whether to temporarily reassign the employees and select who will be transferred.

G. Summary:

In weighing all of the relevant factors discussed above in detail, I find that there are more distinctions than shared interests between the employees of the No. 3 and No. 5 mines. Although both groups of employees perform the same functions and enjoy the same benefits, they do so at different locations, working under different foremen. Most significantly, the No. 3 and the No. 5 miners appear to have limited regular contact with one another and mine coal without any apparent significant coordination of effort. They do not regularly handle the same coal and are not part of an integrated overall process of preparing the coal. I find that these factors demonstrate that the No. 3 surface miners sought by the Petitioner have an identity separate and distinct from that of the No. 5 miners.

Unit Placement of the Clerk, Parts Runner and Mechanics

There remains for consideration the placement of these employees whom the Petitioner seeks to exclude from the unit. The Employer appears to contend that they should be included in any unit that I find appropriate. The record indicates that the No. 3 mine employees have a limited community of interest with the clerk, parts runner and mechanics. Although April Lester conducts the orientation for newly hired employees (including those at the No. 3 mine), occasionally provides them with parts or EMT services, and attends annual retraining with them, these instances appear to be infrequent. Even her role in conveying messages to the employees and foremen appears to be limited since the employees and foremen can communicate directly with one another by radio and Lester's CB radio cannot receive the No. 3 mine's channel. Norma Ferrell provides the No. 3 mine with necessary parts to keep equipment running, but she performs the same duties for other mines as well. Similarly, the mechanics keep the No. 3 mine equipment operable, but it is unclear how often they are at the site. The mechanics appear to come to the jobsite when summoned by a foreman to perform specific, discreet tasks, such as changing a tire, performing needed work on a vehicle's undercarriage or diagnosing a major mechanical malfunction.

Lester spends the vast majority of her day in the office near the No. 5 mine and a substantial portion of Ferrell's working day is devoted to going to and from vendors to pick up parts. Even when Ferrell is on the jobsite, she appears to primarily interact with the mechanics and foremen. There also appears to be relatively little work-related contact between the mechanics and the No. 3 employees and the mechanics have responsibility for several mines. There is no evidence that the No. 3 surface miners ever perform any of the duties of the clerk, parts runner or mechanics or vice versa. Although Lester and three of the No. 3 mine employees are EMTs, this is clearly a secondary function for all of these employees, who primarily are assigned other work and only perform EMT duties as needed.

The rates of pay for the clerk, parts runner and mechanics are not found in the record. However, the working conditions of the No. 3 mine employees are clearly different than those of the clerk, parts runner and mechanics. While the No. 3 employees are engaged in mining coal, the clerk works primarily in an office; the parts runner spends a substantial portion of her time in

a motor vehicle going to and from vendors to pick up parts; and, the mechanics travel among all of the Employer's facilities in specialized trucks diagnosing and repairing equipment rather than operating it. Supervision of these employees is also distinctly different from that of the No. 3 mine employees. Lester reports to the No. 5 dayshift foreman and Ferrell is dispatched from the Employer's main office in Pikeville, Kentucky. The record did not reflect who supervises the mechanics, but it is unlikely that it is the No. 3 foremen because the mechanics perform duties at all of the Employer's mines.

Accordingly, I find few commonalities and a limited community of interest between the No. 3 surface miners and the clerk, parts runner and mechanics. Further, I find no basis in the record to conclude that the clerk, parts runner or mechanics perform unit work for any significant period of time such that they should be treated as dual function employees. See, e.g., *Ansted Center*, 326 NLRB 1208 (1998). I shall therefore exclude the clerk, parts runner or mechanics from the unit found appropriate herein.

Under these circumstances, I find that the unit sought by the Petitioner limited to the surface miners of the No. 3 mine constitutes an appropriate single location unit. Having found that the Petitioner has petitioned for an appropriate bargaining unit, there is no need to analyze the appropriateness of any alternative units suggested by the Employer.

IV. EXCLUSIONS FROM THE UNIT

The parties agree, the record shows, and I find that the following persons are supervisors within the meaning of the Act: <u>Jeff Sands</u>, Vice President; <u>Becke Elkins</u>, Human Resources Manager; <u>William "Jay" Curry</u>, Foreman; <u>Jerry Francis</u>, Foreman; <u>James Hynd</u>, Foreman; and <u>Gary Ludwig</u>, Foreman. The parties also agree, the record shows, and I find that <u>Ray Bennett</u>, Engineer is a professional/technical employee and should not be included in the unit. I will also exclude <u>April Lester</u>, clerk; <u>Nora Ferrell</u>, parts runner, and <u>Lenzie Blanton</u>, <u>Marshall LeMaster</u>, and Joe Fairchild, mechanics.

V. CONCLUSIONS AND FINDINGS

Based upon the foregoing and the entire record in this matter, I conclude and find as follows:

- 1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
- 2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. ⁵/
 - 3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

⁵/ At the hearing, the parties stipulated that during the past 12 months, a representative period, the Employer purchased goods and materials valued in excess of \$50,000 which were shipped directly to its Eagle Creek No. 3 mine from points located outside the State of West Virginia. Accordingly, I am satisfied that the Employer's operations meet the Board's statutory standard for asserting jurisdiction.

- 4. The Petitioner claims to represent certain employees of the Employer.
- 5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
- 6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed by the Employer at the Spruce #1 mine (aka Eagle Creek No. 3) at Sharples, West Virginia, excluding all office/clerical, security guards, professional employees and supervisory personnel.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Mine Workers of America, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

VII. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less then 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

VIII. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior*

Underwear, Inc., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list and if the conditions set forth above to warrant an election are satisfied, I will make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **November 15, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Because the list will be made available to all parties if it is determined to proceed to an election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

IX. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer, if an election is subsequently ordered, must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

X. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request

must be received by the Board in Washington by 5 p.m., EST on **November 22, 2010**. The request may not be filed by facsimile.

Dated at Cincinnati, Ohio this 8th day of November 2010.

Gary W. Muffley, Regional Director Region 9, National Labor Relations Board

Region 9, National Labor Relations Board 3003 John Weld Peck Federal Building

550 Main Street

Cincinnati, Ohio 45202-3271

Classification Index

420-2900

420-2903

420-2909

420-2921

420-2936

420-2945

420-2957

420-2963

420-4000

120 1617

420-4617

420-4633

420-5000

420-5034

420-5068

420-5075

420-6260

420-7303